Dun & Bradstreet Software Services, Inc. ***and*** **Christine Kelley.** Case 1–CA–30990

April 27, 1995

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING AND COHEN

Upon a charge filed by Christine Kelley on October 6, 1993, and amended on July 7, 1994, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 1, issued a complaint and notice of hearing on July 20, 1994, against Dun & Bradstreet Software Services, Inc., alleging that the Respondent violated Section 8(a)(1) of the National Labor Relations Act. The Respondent filed an answer admitting in part, and denying in part, the complaint allegations, and raising an affirmative defense.

On October 5, 1994, the Respondent filed with the Board a motion to dismiss or Motion for Summary Judgment, with exhibits, contending that the complaint should be dismissed because the underlying charge, although filed on October 6, 1993, was not served on the Respondent until October 13, 1993, which is outside the 6-month time period specified by Section 10(b) of the Act. On October 17, 1994, the General Counsel and the Charging Party filed briefs in opposition to the Respondent's motion, and on October 21, 1994, the Respondent filed a reply brief. On October 31, 1994, the Board issued an order transferring proceeding to the Board and Notice to Show Cause why the Respondent's motion should not be granted.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

On the entire record in this proceeding, the Board makes the following

Ruling on the Motion for Summary Judgment

The complaint alleges that on or about April 2, 1993, through April 12, 1993, the Respondent's employee, Christine Kelley, engaged in concerted activities with other employees for the purpose of mutual aid and protection by: (1) discussing the impact on working conditions of the Respondent's potential change of the Framingham facility's cafeteria vendor; (2) complaining to the Respondent on behalf of fellow employees regarding the potential change; and (3) with other employees, preparing, circulating and distributing petitions for employees to sign relating to that potential change. The complaint further alleges that on April 8, 1993, Branch Manager Madeline Osit told other employees that she wanted to discharge all employees involved with the petition. Finally, the complaint alleges that on April 12, 1993, the Respondent discharged Kelley for her protected concerted activities and that the Respondent's Philadelphia branch manager, David Surber, told employees that Kelley had been discharged because of her involvement with and circulation of the petition.

In its answer, the Respondent admits that it terminated Kelley on April 12, 1993, but denies that the discharge violated Section 8(a)(1). Further, the Respondent asserts as an affirmative defense that the Board lacks jurisdiction to proceed in this matter because the complaint is barred as untimely pursuant to Section 10(b) of the Act. In this regard, the Respondent states that Kelley alleged in her amended charge that she was terminated on April 12, 1993, and that the General Counsel admits, in paragraph 1(a) of the complaint that a copy of the original unfair labor practice charge in this proceeding was not served on the Respondent until October 13, 1993, 1 day after the expiration of the 10(b) period. Accordingly, the Respondent contends that the Charging Party failed to serve the charge within the 6-month period as required by the Act.

In its motion to dismiss the Respondent submits that the ''allegations of the Complaint, as admitted by [the] Respondent, demonstrate that the Board lacks jurisdiction to conduct a hearing in this matter.'' The Respondent contends that it is undisputed that the Charging Party failed to effectuate timely service of the charge on the Respondent within the 10(b) period as required by the statute. The Respondent further contends that because Section 102.14 of the Board's Rules and Regulations makes clear that it is the charging party's responsibility to serve the charge on the respondent, the Charging Party herein ''cannot complain that she is being punished for administrative delay in mailing the charge.'' Further, the Respondent contends that there is no allegation, nor is there any evidence, that the Respondent engaged in any conduct that frustrated timely service, but rather the Charging Party simply failed to mail the original charge to the Respondent within the statute of limitations period. Finally, the Respondent contends that the fact that the Charging Party was represented by counsel within the applicable 6-month period precludes her claims of equitable estoppel.

The General Counsel and the Charging Party contend that, in view of the timely filed charge with the Board, the August 30, 1993 letter sent to the Respondent by Kelley's attorney should be deemed a substitute for the service of the charge on the Respondent since the letter unambiguously notified the Respondent of Kelley's claim under Section 8(a)(1) of the Act. The General Counsel and the Charging Party assert that the letter specifically identified the statutory basis of the claim and set forth in detail the factual basis of Kelley's claim, and, therefore, complied with the service requirements of Section 10(b). The General Counsel and the Charging Party further contend that equi-

table tolling of the statute of limitations period is justified because (1) Kelley detrimentally relied on the advice of the Region's information officer that the Regional Office would serve the charge in a timely manner; (2) the Respondent suffered no prejudice; and (3) there are no legal requirements that mandate a dismissal of the charge as a result of the Region's service of the charge 6 months and 1 day after the alleged unfair labor practice.

The Charging Party additionally asserts that the filing of the charge was delayed at the Respondent's request, and, therefore, that the Respondent should be estopped from taking advantage of the delay it sought. The Charging Party also argues that the goals underlying Section 10(b) have been met despite the 1-day delay and that to dismiss the charge as time-barred, given the circumstances, would ''elevate form over substance.''

We find, in agreement with the Respondent, that the complaint must be dismissed. Section 10(b) provides that ''no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board *and the service of a copy thereof upon the person against whom such charge is made.*'' (Emphasis added.) Section 102.14 of the Board's Rules and Regulations requires that the charging party be responsible for the timely and proper service of a copy of the charge on the person against whom such charge is made. The rule further provides that ''the Regional Director will, as a matter of course, cause a copy of such charge to be served on the person against whom the charge is made, but he shall not be deemed to assume responsibility for such service.'' Therefore, Section 10(b) of the Act and Section 102.14 of the Board's Rules and Regulations make clear that it is the charging party's obligation to effectuate service on the respondent within the 10(b) period. In the instant case, however, it is undisputed that the unfair labor practice charge was not served on the Respondent until October 13, 1993, 6 months and 1 day after the alleged unlawful discharge, even though the charge was timely filed on October 6, 1993.

Since the addition of the 10(b) proviso language by Congress in the 1947 Taft-Hartley amendments, the Board has consistently held that, absent the existence of a properly served charge, a respondent will not be liable for conduct occurring more than 6 months earlier. *Old Colony Box Co.*, 81 NLRB 1025, 1027 (1949); *Erving Paper Mills*, 82 NLRB 434, 435 (1949); *Cathey Lumber Co.*, 86 NLRB 157, 162–163 (1949), enfd. 185 F.2d 1021 (5th Cir. 1951), vacated on other grounds 189 F.2d 428 (5th Cir. 1951); *Luzerne Hide & Tallow Co.*, 89 NLRB 989, 1004 (1950); *Koppers Co.*, 163 NLRB 517 (1967); and *Ducane Heating Corp.*, 273 NLRB 1389, 1391 (1985). See also *West v. Conrail*, 481 U.S. 35, 36–38 (1987). As the Board explicitly stated in *Koppers*, ''In each case, the 6-month period is determined by the date of the service of the charge. Thus, a day 6 months earlier becomes the cutoff date and activities occurring before such date may not be alleged as unfair labor practices.'' 163 NLRB at 517.

It is thus clear from these cases that, absent some special circumstance, the service of the instant charge on October 13, 1993, precludes the General Counsel from issuing a complaint alleging that the Respondent's discharge of Kelly on April 12, 1993, constituted an unfair labor practice.[1]

Contrary to the contentions of the General Counsel and the Charging Party, we find no special circumstances present in this case that would warrant a conclusion that the statutory service requirement was satisfied. Initially, we note that the General Counsel and the Charging Party do not allege that the 10(b) period should be tolled because the Respondent fraudulently concealed the operative facts underlying the alleged violation or in any other way prevented the Charging Party from reasonably discovering the operative facts regarding the alleged unlawful discharge. Nor do they allege that the Respondent in any way attempted to evade service or otherwise thwart the Charging Party's ability to timely serve the Respondent. Rather, they allege that the 10(b) period should be tolled because of the Charging Party's August 30, 1993 letter to the Respondent putting the Respondent on notice of the Charging Party's allegation that Kelley's discharge violated Section 8(a)(1) of the Act and that the Charging Party detrimentally relied on the Regional Office's erroneous advice regarding service of the charge.

We find no merit in these contentions. Section 10(b) does not require merely that a charging party put a respondent on notice of the possibility that an unfair labor practice charge might be filed. Rather, it requires that a charge be filed and served within the 6-month period after the alleged unlawful conduct. Thus, the August 30, 1993 letter fails to satisfy the statutory requirements.[2]

Further, while we regret that the Charging Party may have received erroneous advice from the Regional Office, such erroneous advice does not in any way al-

[1] The reliance of the General Counsel and the Charging Party on the Board's decisions in *Freightway Corp.*, 299 NLRB 531 (1990), and *Buckeye Plastic Molding*, 299 NLRB 1053 (1990), is misplaced. In both of those cases, unlike here, the statutory requirement of service on the respondents within the 6-month limitations period was satisfied—in the former case by an unsigned copy of the charge and in the latter case by service of the complaint. Here, however, both the charge and the complaint were served on the Respondent more than 6 months after the alleged unlawful discharge.

[2] Similarly, even if the Charging Party delayed filing a charge at the request of the Respondent, the Respondent in no way prevented the Charging Party from serving the charge, which was timely filed, within the limitations period.

leviate or eliminate the Charging Party's statutory obligation to timely serve the Respondent, as explicitly set forth in the Board's Rules and Regulations.

For the foregoing reasons, we find that the complaint is barred by Section 10(b), and we accordingly grant the Respondent's motion and dismiss the complaint.

ORDER

The complaint is dismissed.